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No. 195

IN THE

# Supreme Court of the United States

October Term, 1935

UNITED STATES OF AMERICA, *Petitioner*

*v.*

BANK OF NEW YORK AND TRUST COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT, BANK OF NEW YORK AND TRUST COMPANY

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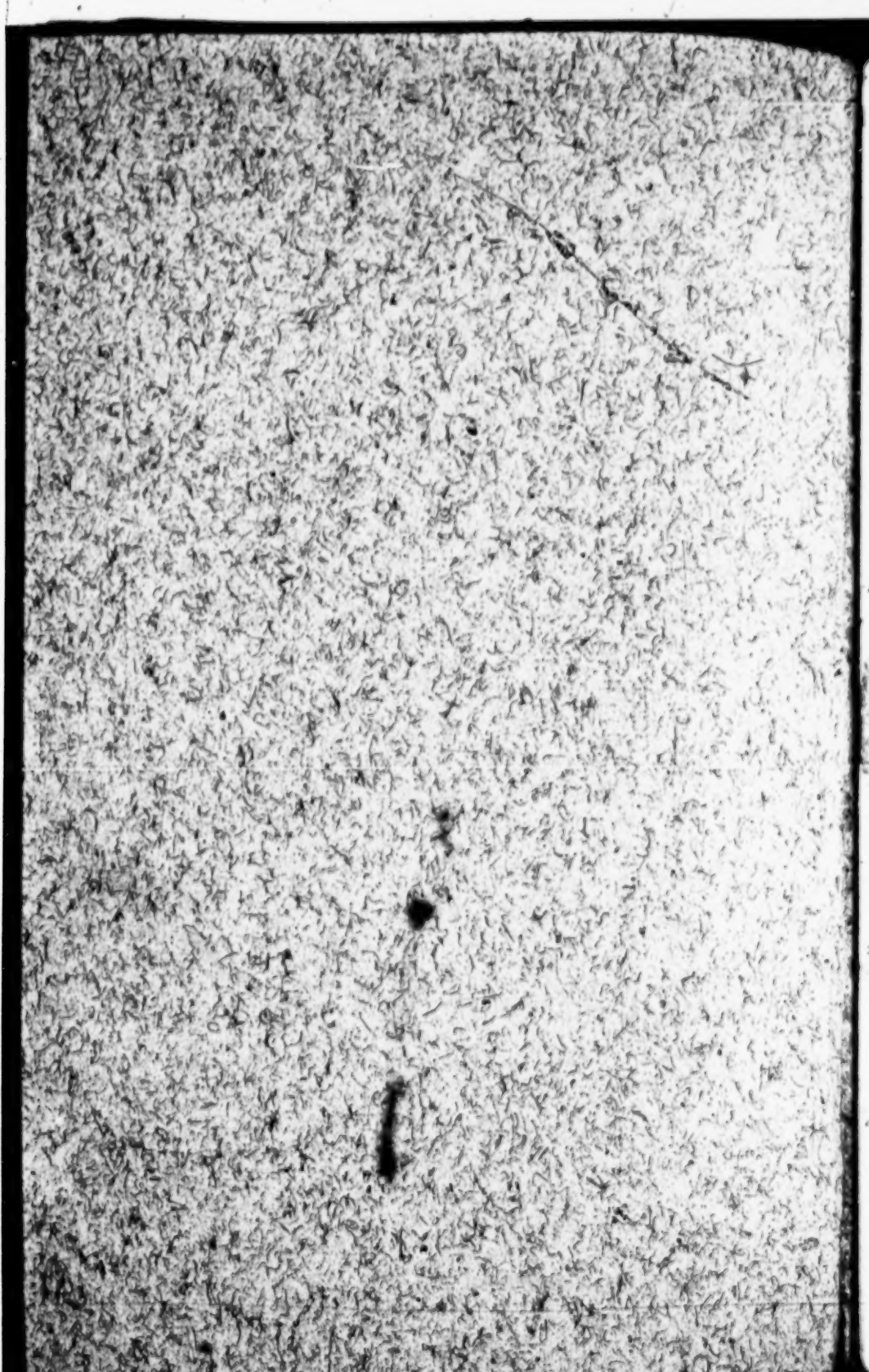

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## BRIEF FOR RESPONDENT, BANK OF NEW YORK AND TRUST COMPANY.

The opinion of the District Court (R. 80) is reported in 10 F. Supp. 269; the opinions of the Circuit Court of Appeals (R. 89) are reported in 77 F. (2d) 866.

### Questions Presented

1. Whether the federal courts will give extraterritorial effect to the Soviet decrees of confiscation over property situated within a State of the United States, and especially where the highest court of the State where such property is located has denied extraterritorial effect to such Soviet decrees as contrary to the public policy of such State.

2. Whether, by the diplomatic proceedings of November 16, 1933, between the President and the representative of the Soviet government, the title to the property here in question has been validly assigned to and accepted by the petitioner, United States.

3. Whether the District Court had jurisdiction of the cause of action asserted in the complaint, the N. Y. state court having assumed jurisdiction and taken constructive possession of the funds in controversy prior to the commencement of the instant suit.

4. Whether the complaint, in any aspect, sets forth a cause of action in equity against the respondent, a mere bailee.

## The Decisions Below

The District Court decided in the negative questions 1 and 2, holding that the Soviet decrees of confiscation were against the public policy of the United States and that the assignment and acceptance of November 16, 1933 did not include the property now in question. The Circuit Court, by a majority, decided question 3 in the negative, holding that the federal courts were without jurisdiction by reason of the prior jurisdiction of the state court over the same property sought in the instant suit. Question 4 has not been decided by either of the courts below.

The dissenting opinion in the Circuit Court is based entirely upon the view that the Soviet decrees of confiscation, by virtue of our recognition of the Soviet government, retroactively and extraterritorially vested the Soviet government with title to the assets of United States branches of Russian corporations, although such assets were never within the territorial jurisdiction of such So-

viet government and were located within the territorial jurisdiction of the State of New York. Such views are directly contrary to the previously expressed views of the same judge (*Lehigh Valley R. Co.* v. *State of Russia*, 21 Fed. (2d) 396, 401; certiorari denied, 275 U. S. 571) where, speaking for the entire court, he said: "It is only the acts performed in its own territory that can be validated by the retroactive effect of recognition. Acts theretofore performed outside of its own territory cannot be validated by recognition."

## Statement

Petitioner appeals, by certiorari allowed, from a decree of the Circuit Court affirming a decree of the District Court dismissing the complaint. The Circuit Court held that the District Court had no jurisdiction to entertain the bill, and the District Court held that the petitioner's bill failed to state a cause of action (R. 85). The instant suit was commenced on August 22, 1934 by the petitioner as alleged assignee of the alleged title of the Soviet government under certain Soviet decrees of confiscation. The District Court held (a) that the Soviet government had no title or interest except that based upon confiscation, which is a concept so repugnant to our public policy that our courts will not recognize and enforce it over property within our borders, and (b) that the assignment in terms did not cover the fund in question (R. 80).

The respondent is a mere bailee, not a trustee (R. 83; see state court order of August 11, 1931, R. 25-26; *Matter of People—Moscow Fire Ins. Co.*, 255 N. Y. 433, 435). As, owing to apprehension as to the effect of the last sentence in Equity Rule XXXVII, providing that "intervention

shall be in subordination to, and in recognition of, the propriety of the main proceeding," the real parties in interest, with the exception of a single creditor, did not intervene, the respondent is called upon to set forth the general principles relied upon by all of such parties in opposition to the petitioner's claim.

The complaint, alleging that the respondent received the funds in question pursuant to an order of the Supreme Court of New York State (R. 3), the order in question was, by bill of particulars, placed upon the record (R. 23). From this order, it appears that the same was made in the course of liquidation proceedings brought and prosecuted by the N. Y. Superintendent of Insurance in accordance with N. Y. law in N. Y. courts, the funds being within the jurisdiction of the N. Y. court, in the actual possession of the Superintendent of Insurance as liquidator (ancillary receiver or receiver *pendente lite*) in the State of New York of the property of the former Russian corporation, appointed by such state court (former N. Y. Ins. Law, sec. 63, subds. 4 and 5, now L. 1932, ch. 191, art. XI, secs. 406-408, in substitution without material change for former sec. 63 repealed). By this order (of August 11, 1931), the N. Y. Supreme Court, acting in accordance with the decisions of the N. Y. Court of Appeals (see *Matter of People* (*Northern Ins. Co.—Moscow Fire Ins. Co.*), 255 N. Y. 433; see also, in connection therewith, *Matter of People* (*Russian Reinsurance Co.*) 225 N. Y. 415), ordered the funds in controversy to be deposited with the respondent as the agent or depository of the Moscow Company and of Paul Lucke, its surviving director and conservator of its property, upon the filing of a written stipulation of the Moscow Company and of such surviving director and

conservator that the assets or fund would not be withdrawn except upon the order of a court of competent jurisdiction (R. 25-26). Such fund was so deposited with the respondent by the Superintendent of Insurance as such liquidator on April 18, 1933 (Complaint, R. 3).

As shown by petitioner in its affidavit for injunction and by respondent in its opposing affidavits (R. 34, 36-37, 48), on April 19, 1933, the day following the delivery of such funds to the respondent, a suit (R. 11-17) was begun in the N. Y. Supreme Court in the name of the Moscow Company and of Paul Lucke as surviving director of the Company and conservator of its property as plaintiffs and the respondent and some 143 other parties as defendants, such other parties being creditors or shareholders (or their executors, administrators or next of kin) of the Company (R. 14). The object of such suit (hereinafter called the "Lucke suit") was to determine the disposition of such funds (R. 16). Service of process was thereafter obtained, a referee to hear and determine was appointed, a long trial was had before such referee, and such suit had proceeded to judgment which was entered on August 22, 1934, the day upon which the instant suit was brought (R. 37, 49, 53).

During the period of the extensive proceedings in the courts of the State of New York to liquidate the fund and distribute it according to its laws, the highest court of the state repeatedly held, subsequent to recognition as well as before, that these particular confiscatory Soviet decrees upon which petitioner relies were contrary to the public policy of the State of New York, shocking to its sense of justice, and would not be enforced in its courts; and that by such decrees relied upon by petitioner the Soviet government acquired no title to any such assets in

the State of New York of the former Russian corporations (*Vladikavkazsky Ry. Co.* v. *N. Y. Trust Co.*, 263 N. Y. 369, 378-379; *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, 90, 108-109; *James* v. *Second Russian Ins. Co.*, 239 N. Y. 248, 257).

During such proceedings in the courts of New York to liquidate and distribute the fund, the N. Y. Court of Appeals successively held that the surviving directors of these Russian insurance corporations "retained the power to conserve property in this country as far as the courts of New York can protect it" (1928, *James & Co.* v. *Rossia Insurance Co.*, 247 N. Y. 262, 271); to retain attorneys and counsel (1929, *Matter of Second Russian Insurance Co.*, 250 N. Y. 449); if sufficient to constitute a quorum of the corporation's board of directors, to receive the surplus of the funds after the N. Y. Superintendent of Insurance as liquidator had determined and paid, not only the claims of so-called U. S. creditors (those protected by the statutory insurance trusts) but also the claims of such other creditors as might have been filed with him (Feb. 1931, *Matter of People—Russian Reinsurance Co.*, 255 N. Y. 415); and, where the number of such surviving directors were less than such quorum, to receive the surplus funds as conservators of the corporation's property upon giving a bond conditioned to apply such funds to the use of the corporation, its creditors and shareholders, or, in the alternative, that such funds be deposited, as in the instant case, with a trust company in the city of New York "upon the stipulation of the insurance company and its conservators that the fund will not be withdrawn except upon the order of a court of competent jurisdiction" (Feb. 1931, *Matter of People—Northern Ins. Co.,—Moscow Fire Ins. Co.*, 255 N. Y. 433, 435, R. 25-26).

That the Soviet decrees are confiscatory in their nature is specifically alleged in the complaint (R. 3); is shown by the decrees themselves (R. 29-31); and is so held in all the opinions below (R. 81, 89, 108).

An extended statement of the proceedings in the New York state courts is found in the referee's opinion in the Lucke suit (R. 53-60).

## Summary of Respondent's Argument

1. Soviet Confiscation. The funds in question being within the State of New York and the highest court of the State having declared the admittedly confiscatory decrees of the Soviet government to be against its public policy and unenforcible in its courts, the federal district court will follow the holding of the state court. But, irrespective of the foregoing, the Soviet decrees of confiscation are contrary to the public policy of the United States, and the federal courts will not enforce such decrees over property located within the jurisdiction of our courts. Recognition, even if coupled with the alleged acceptance by the President of an assignment of all Russian governmental claims to property in the United States, did not authoritatively determine that the Soviet confiscatory decrees were not against the public policy of the United States.

2. The Litvinoff Assignment. The terms of this ambiguous assignment should not be given a construction having the effect of the President's accepting on behalf of the petitioner United States the office of a collection agent for the Soviet government of alleged claims of any kind, based upon its unique decrees, against property in the United States, with the consequent responsibilities and

liabilities. In the case of diplomatic assignments affecting non-enemy nationals, private property of nationals of the assignor government always will be recognized and protected. No construction of a treaty (let alone a so-called Executive agreement) which would impair that security to private property will be given further than its positive words require.

3. Jurisdiction. When on April 19, 1933 the Lucke suit (R. 11) was begun in the state court, having for its object the determination of the disposition of the property deposited with the respondent (R. 16), the state court acquired constructive control of the property. The nature of such suit was therefore *quasi in rem.* The instant suit is likewise *quasi in rem,* notwithstanding a prayer for an accounting which is improper as matter of law if the prior state court is one *quasi in rem* (*Waterman* v. *Canal-Louisiana Bank,* 215 U. S. 33, 44-46). The instant suit is brought for the purpose of asserting a claim to the whole of the funds now in the jurisdiction and control of the state court in the Lucke suit; there is no question here of personal liability of the respondent apart from the custody of the fund placed in its possession by the state court (R. 92). The rule respecting priority of jurisdiction therefore applies.

4. No Equity Jurisdiction. The complaint fails in any aspect to state a cause of action in equity against respondent, a bailee, not a trustee. The complaint presents a situation where the petitioner asserts an alleged legal title to property in the possession of a bailee for a third person; and is silent as to any allegations showing absence of adequate remedy at law.

# ARGUMENT

## I

**The Soviet decrees of confiscation and appropriation were not effective to transfer title to property having a situs outside of Russia and in the State of New York in the United States.**

The question of the power of the Soviet government to terminate the existence of pre-Soviet Russian corporations is not here involved. Nor is there involved the power of the Soviet government to confiscate property actually situated in Russia, whether belonging to Russian corporations or others. The sole question here under discussion is whether the Soviet decrees of confiscation did or can transfer title to Russian corporate property which at and before the time of the promulgation of the Soviet decrees of confiscation was located in the State of New York. If the Soviet government by its decrees of confiscation obtained no title to Russian corporate funds situated in New York, the petitioner, United States, of course obtained no title to such propery by assignment from the Soviet government, however broadly such assignment may be construed. As said by this Court in *United States* v. *Buford* (3 Peters 12, 30), "It can require no argument to show that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor."

### A. The Situs of the Property

The petitioner, invoking the doctrine of *mobilia sequuntur personam,* argues that the securities and funds of Russian insurance corporations on deposit in New York had a legal situs in Russia and were therefore construc-

tively under the control of Russia at the time when the existence of the corporations was terminated in Russia by the Soviet decrees. Such argument has no support either in the facts or the law.

It appears from the complaint herein that the property to which petitioner asserts title by alleged assignment from the Soviet government consists of the residue of a deposit with the New York Superintendent of Insurance made by the Moscow Fire Insurance Company, prior to the Russian revolution, in compliance with the laws of the State of New York as a condition precedent to obtaining authority to transact business within the State of New York, and that such residue of deposit, except for a small amount of cash, consists entirely of obligations of the City of New York and of the United States, or the proceeds thereof (R. 3-4). It further appears from the complaint herein that such residue of the deposit was on April 18, 1933, transferred by the Superintendent of Insurance, under order of the New York Supreme Court, to the respondent "as agent or depositary of the said Moscow Fire Insurance Company, said fund not to be withdrawn except upon the order of a court of competent jurisdiction" (R. 3). As a matter of accuracy the funds were transferred to the respondent as agent or depositary not merely of the Moscow Company but also as agent or depositary of Paul Lucke as surviving director and conservator of said company (R. 35-36). It is alleged in the complaint that the Soviet decrees of 1917 and 1918, confiscating the assets of the Moscow Fire Insurance Company, included the right, title and interest of the Moscow Company and its stockholders in and to the deposits which at that time were in the possession of the New York Superintendent of Insurance (R. 3) or the Bankers Trust Company, as trustees (R. 46).

At the time when the Soviet decrees of confiscation were promulgated in 1917 and 1918 and thereafter, the legal title to the deposits which had been made in New York by the Moscow Fire Insurance Company was vested in the Superintendent of Insurance of New York and in the Bankers Trust Company of the City of New York, as trustees (R. 3, 46; New York Insurance Law, sec. 27). Such deposits constituted the local capital of the local branch of the company, treated as a complete and separate organization (*Matter of People, Norske-Lloyd Ins. Co.*, 242 N. Y. 148, 159). The interest of the Moscow Company in such deposits was not a legal but only an equitable interest in and to any balance remaining of such deposits after satisfaction of the claims of domestic creditors (R. 3). The situation then was, as to the New York deposits, that the legal title thereto was vested in an official and in a corporation of the State of New York, the securities themselves were held on deposit in the State of New York, and the obligors upon the securities were the City of New York and the United States of America. To argue on these facts that the situs of the securities or their proceeds was or is in Russia and that Russia had or has dominion over them is stretching legal fictions to an absurdity.

The cases cited by petitioner in alleged support of its argument to the effect that the situs of the securities forming the New York deposits was in Russia, are cases of State succession taxes at the domicile upon the estates of deceased persons. Such cases proceed on the theory that succession taxes are not property taxes but excise or privilege taxes imposed upon the transfer by will or intestacy permitted or enjoyed at the domicile (*Farmers Loan Co. v. Minnesota*, 280 U. S. 204, 214). Such cases

obviously have no application to the dissolution of a corporation and are further inapplicable because no succession at the domicile is enjoyed or even permitted except by confiscation in favor of the Soviet government. Furthermore, the cases relied on by petitioner apply only as between the States of the United States and do not apply to property of aliens in this country (*Burnet v. Brooks*, 288 U. S. 378, 405). To tax the securities themselves or their proceeds, and *a fortiori* to confiscate them, Russia must have had an actual dominion over them, and such dominion never existed. The securities here in question were completely localized in the United States (*DeGanay* v. *Lederer*, 250 U. S. 376, 382). Their actual situs has always been in the State of New York (*Burnet* v. *Brooks*, *supra*, p. 389). The fact that legal title to the securities was vested in New York trustees manifestly fixed their situs in New York to the exclusion of Russia, the domicile of the Company which had only an equitable interest in and to the residue of the securities (*Safe Deposit & Trust Co. of Baltimore* v. *Commonwealth of Virginia*, 280 U. S. 83, 91-93). The maxim *mobilia sequuntur personam* is at most a fiction which must yield to established facts of legal ownership, actual presence and control elsewhere, and to facts and circumstances which in justice require it (*Safe Deposit & Trust Co. of Baltimore* v. *Commonwealth of Virginia*, *supra*, p. 92; *Burnet* v. *Brooks*, *supra*, p. 391).

Likewise, the actual situs of the cash on deposit with the respondent, whether representing cash payments made by the Superintendent of Insurance or the proceeds of the sale of securities, is in the State of New York (*Pennington* v. *Fourth National Bank*, 243 U. S. 269, 271; *Security Savings Bank* v. *California*, 263 U. S. 282). In the cases last cited, it was held by this Court that a State has full

dominion over deposits in a bank of the State even though the depositors or their heirs or legal representatives may reside elsewhere.

**B. The Application of the Law and Public Policy of the State of New York with Reference to the Fund**

Since the funds in question are completely localized and have their situs in the State of New York, the law and public policy of the State of New York must in the last analysis determine the question of the disposition and ownership of the funds. (*Clark* v. *Williard,* 294 U. S. 211, 214; *Same* v. *Same,* 292 U. S. 112, 123; *City Bank Co.* v. *Schnader,* 293 U. S. 112, 118-119; *Burnet* v. *Brooks,* 288 U. S. 378, 399; *Pennington* v. *Fourth National Bank,* 243 U. S. 269, 271; *Pennoyer* v. *Neff,* 95 U. S. 714, 722). In *Clark* v. *Williard, supra,* this Court in speaking of a foreign statutory successor of a dissolved foreign corporation said (294 U. S. at p. 214), "He must submit, as must they, to the mandate of the sovereignty that has the physical control of what he would reduce to his possession." In *Burnet* v. *Brooks, supra* (288 U. S. at p. 399) and in *Disconto-Gesellschaft* v. *U. S. Steel Co.,* 267 U. S. 22, 28, this Court said, "But the question who is the owner of the paper depends upon the law of the place where the paper is." In *Pennington* v. *Fourth National Bank, supra,* this Court said (243 U. S. at p. 271), "The Fourteenth Amendment did not in guaranteeing due process of law, abridge the jurisdiction which a state possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and intangible property. Indebtedness due from a resident to a non-resident—of which bank deposits are an example—is property within

the State." In *Pennoyer* v. *Neff, supra,* this Court said (95 U. S. at p. 722), "One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself * * * and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed and transferred."

That the State of New York, in the exercise of its proper jurisdiction, has declared in unequivocal terms that it does not recognize the title of the Soviet government under its decrees of confiscation to private property on deposit in the State of New York and that such property must be distributed to or for the use of the creditors and shareholders of the companies which deposited such property, is beyond dispute. In the case of the funds deposited with the New York Superintendent of Insurance by the Moscow Fire Insurance Company, it appears from the petitioner's own bill of particulars of the complaint herein that the New York Court of Appeals has directed that the corporate assets in New York of the Moscow Fire Insurance Company be disposed of as follows:

(a) By the satisfaction of the charges, expenses and taxes of the Superintendent of Insurance.

(b) By the payment of all just claims filed with the Superintendent of Insurance.

(c) By the payment of any just claims by attachment against the funds.

(d) By delivery of the surplus to Paul Lucke as sole surviving director of the company and conservator of its

property upon the filing by him of a surety company bond conditioned upon the faithful application by him of the assets to the use of the Moscow Company, its creditors and shareholders; or, in the alternative, at the election of the Moscow Company, as represented by its said surviving director and conservator, by delivery of such surplus assets to the respondent as agent or custodian under stipulation of the Moscow Company and its said conservator that such funds would not be withdrawn except by order of a court of competent jurisdiction (R. 22-26; *Matter of People—Moscow Fire Insurance Company,* 255 N. Y. 433). In the companion case of *Matter of People—Russian Reinsurance Company and First Russian Insurance Company,* 255 N. Y. 415, the New York Court of Appeals, speaking by CARDOZO, *Ch. J.*, refused to direct the retention of the funds until the recognition of a government in Russia and said at pages 422 and 424: "Holding as we do that the surplus must be made available for the payment of creditors and policyholders with claims founded upon foreign business, there remains the question of the remedy • • • The fund being thus subjected to the remedies of creditors, the question must still be answered how the surplus is to be disposed of after such claims have been allowed. We think the surplus then remaining should be paid to the corporation, represented by directors, a quorum of the board."

While the order of August 11, 1931, entered upon *remittitur* of the Court of Appeals, attached as Exhibit A to complainant's bill of particulars (R. 23), was made prior to recognition of the Soviet government by the United States, the New York Court of Appeals has declared in the most positive terms, both before and after recognition, that it will not enforce or recognize the

Soviet decrees of confiscation as applying to property in the State of New York belonging to Russian corporations. In *James & Co.* v. *Second Russian Insurance Company*, 239 N. Y. 248, decided in 1925, the Court of Appeals, speaking by CARDOZO, *J.*, said at page 257: "As to the Soviet decree, we think its attempted extinguishment of liabilities is *brutum fulmen*, in England as well as here, and this whether the government attempting it has been recognized or not. Russia might terminate the liability of Russian corporations in Russian courts or under Russian law. Its fiat to that effect could not constrain the courts of other sovereignties, if assets of the debtor were available for seizure in the jurisdiction of the forum (citing cases). * * * One government does not execute the tax laws of another (*State of Colorado* v. *Harbeck*, 232 N. Y. 71, 82), nor help another in enforcing a penalty or forfeiture (*Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 102)." In *Matter of Second Russian Insurance Co.*, 250 N. Y. 449, decided in 1929, the Court of Appeals said at page 451: "However the Second Russian Insurance Company, its creditors or stockholders, are entitled to these moneys and they cannot be held in perpetuity by the Superintendent of Insurance." In *Petrogradsky M. K. Bank* v. *National City Bank*, 253 N. Y. 23, decided in 1930, the Court of Appeals, speaking by CARDOZO, *Ch. J.*, said at page 29: "We do not recognize the decrees of Soviet Russia as competent to divest the plaintiff of the title to any assets that would otherwise have the protection of our law." In *Vladikavkazsky Ry. Co.* v. *N. Y. Trust Co.*, 263 N. Y. 369, decided in 1934 after recognition of Soviet Russia by the United States, the Court of Appeals, speaking by HUBBS, *J.*, said at page 378:

> "The deposit was made in New York City, the home of the bank; that is where the contract obli-

gation was created and where it is by its terms to be performed, entirely outside Russian jurisdiction. Laws of foreign governments have extraterritorial jurisdiction only by comity (*Huntington* v. *Attrill*, 146 U. S. 657, 669).

"The principle which determines whether we shall give effect to foreign legislation is that of public policy (citing cases).

"Where there is confliction between our public policy and comity, our own sense of justice and equity as embodied in our public policy must prevail (citation).

"It is hardly necessary to state that the arbitrary dissolution of a corporation, the confiscation of its assets and the repudiation of its obligations by decrees, is contrary to our public policy and shocking to our sense of justice and equity. That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts."

Finally, in *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, decided in December 1934 after recognition of Soviet Russia, the Court of Appeals, speaking by CRANE, *J.*, said at page 90: "Recognition does not compel our courts to give effect to foreign laws if they are contrary to our public policy" and speaking by LEHMAN, *J.*, said at page 106:

"Recognition did give the Soviet government, under our law, an international standing which it did not have before. Even so, we have applied the same test after recognition as before, and have refused to give extraterritorial effect to a Soviet decree of confiscation, though recognition had 'validated' its decrees (Vladikavkazsky Ry. Co. *v.* New York Trust Co., supra). In that case, we even

pointed out that the basis of previous decisions was not the lack of recognition, but the fact that confiscatory decrees offended our public policy."

The petitioner attempts to distinguish the above cited cases from the instant case on two grounds, first, on the ground that they involved contracts or deposits made in New York and, second, on the ground that there is no intimation as to what the New York courts would have decided had the Soviet government itself appeared as claimant. As to the ground first stated, it appears equally in the instant case that the deposit was in New York under the statutory contract contained in section 27 of the New York Insurance Law to the effect that the fund should be applied in the first place for the benefit of local creditors and in the second place for the benefit of foreign creditors and shareholders (*Matter of People, City Equitable Fire Insurance Co.*, 238 N. Y. 147, 156; *Murphy* v. *Second Russian Insurance Co.*, 240 N. Y. 554; *Matter of People, Norske Lloyd Ins. Co.*, 242 N. Y. 148, 165; *Matter of People, Second Russian Insurance Co.*, 255 N. Y. 412, 413). As to the second ground, the New York Court of Appeals, contrary to the statement of petitioner, has clearly stated that no claim of the Soviet government under its decrees of confiscation would be recognized.

The above cited decisions of the New York Court of Appeals in the Russian cases are not based on any new theories applicable only to the Russian cases, but are quite in harmony with the general law of the State as previously established in non-Russian cases (*Barth* v. *Backus*, 140 N. Y. 230; *Marshall* v. *Sherman*, 148 N. Y. 9; *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99; *State of Colorado* v. *Harbeck*, 232 N. Y. 71).

It is the law and public policy of the State of New

York that upon the dissolution of a corporation its assets are not subject to confiscation or escheat but are to be regarded in equity as the property of the corporate creditors and shareholders and are to be administered and distributed as such (*People* v. *National Trust Co.*, 82 N. Y. 283, 287; *People* v. *O'Brien*, 111 N. Y. 1, 37; *Shayne* v. *Evening Post Publishing Co.*, 168 N. Y. 70, 77; *Lord* v. *Equitable Life Assurance Society*, 194 N. Y. 212, 227-228; *Matter of Long Sault Development Co.*, 212 N. Y. 1, 8). Nor is such law and public policy limited to the protection of the creditors and shareholders of domestic corporations or the domestic creditors of foreign corporations. The rights of all creditors and shareholders are protected insofar as concerns funds on deposit in the State of New York. As said by the Court of Appeals in *Matter of People, City Equitable Fire Insurance Company* (238 N. Y. 147, 156) in speaking of a foreign insurance corporation taken over by the Superintendent of Insurance under the provisions of Section 63 of the Insurance Law:

> "The Superintendent is not, therefore, to take possession of the property solely for the benefit of creditors or policyholders in this State or in the United States but for the interest of all its policyholders, creditors and stockholders wherever they may be. He is to liquidate the business here for that purpose."

The title of a foreign liquidator of a foreign insurance company to assets within the State of New York will be recognized and enforced only where it appears that such foreign liquidator will deal justly with the funds in the interest of creditors and shareholders (*Matter of People, City Equitable Fire Insurance Company, supra*, pp. 157-158; *Martyne* v. *American Union Fire Insurance Co.*, 216

N. Y. 183, 192). Likewise the statutory title of a foreign assignor is recognized in New York only where not in conflict with the laws or public policy of the State (*In re Waite,* 99 N. Y. 433, cited in *Cole* v. *Cunningham,* 133 U. S. 107, 123). Liquidation of a corporation, as said in the opinion of the District Court (R. 82) implies winding up and distribution of the assets among creditors and shareholders (*Lafayette Trust Co.* v. *Beggs,* 213 N. Y. 280, 283; *Matter of Silkman,* 121 App. Div. 202, aff'd. 190 N. Y. 560). The New York law does not recognize and is under no obligation to recognize the alleged title by confiscation of a foreign government to corporate assets located within the state.

### C. The Application of the Law and Public Policy of the United States with Reference to the Fund

The petitioner challenges the application of New York law to the question of the disposition and ownership of the fund and insists that such question is to be settled solely by the law and public policy of the Nation as distinguished from the law and public policy of the state. Under the principles stated by this Court in *Pennoyer* v. *Neff* and *Clark* v. *Williard, supra,* this challenge is without support in law, but assuming the challenge could be maintained, the result would not be different, as the law and public policy of the National government is as strongly opposed to confiscation as the local law and public policy of the State of New York.

It would not be contended by petitioner that the United States may itself confiscate the property in question, contrary to the provisions of the Fifth Amendment to the Constitution. As said by this Court, speaking by Mr. Chief Justice HUGHES, in *Russian Volunteer Fleet* v.

*United States,* 282 U. S. 481, 491-492: "As alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country. The provision that private property shall not be taken for private use without just compensation establishes a standard for our Government which the Constitution does not make dependent upon the standards of other governments". Petitioner's contention must necessarily be, therefore, that the confiscatory decrees of the Soviet government are more effective upon property localized in the United States than the laws of our own country even to the extent of over-riding our public policy as declared in the Constitution—a manifest absurdity.

It is elementary that foreign laws have no extra-territorial effect except by comity (*Hilton* v. *Guyot,* 159 U. S. 113, 163-164; *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 357; *Second Russian Insurance Co.* v. *Miller,* 268 U. S. 552, 560) and that comity is not extended to cover the execution or enforcement of revenue, penal or confiscatory decrees of a foreign government (*The Antelope,* 10 Wheat. 66, 123; *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265, 290; *Huntington* v. *Attrill,* 146 U. S. 657, 666-667; *Baglin* v. *Cusenier Co.,* 221 U. S. 580, 596) or the execution or enforcement of foreign laws contrary to our public policy (*Bank of Augusta* v. *Earle,* 13 Pet. 519, 589; *Huntington* v. *Attrill, supra,* p. 676; *Bradford Electric Co.* v. *Clapper,* 286 U. S. 145, 160).

In particular, the title of a foreign statutory assignee has no operation outside the jurisdiction where the decree was passed, and is recognized in a foreign jurisdiction only by comity when in harmony with the established

policy of the law of the forum (*Cole* v. *Cunningham*, 133 U. S. 107, 129; *Security Trust Co.* v. *Dodd, Mead & Co.*, 173 U. S. 624, 629).

The confiscatory decrees of the Soviet government are clearly opposed to the public policy of the United States (*Fifth Amendment; Russian Volunteer Fleet* v. *United States*, 282 U. S. 481). Even in time of war, our public policy is opposed to confiscation of private property. As said by Chief Justice MARSHALL in *United States* v. *Percheman*, 7 Pet. 51, 87: "That sense of justice and right which is acknowledged and felt by the whole civilized world would be outraged if private property should be generally confiscated and private rights annulled." As further said by this Court in *Miller* v. *United States*, 11 Wall. 268, 310; "It may be conceded that the laws of war do not justify the seizure and confiscation of any private property except that of enemies." It is the law and public policy of the United States equally with the law and public policy of the State of New York that upon the dissolution of a corporation its assets are not forfeited but become in equity the property of the corporate creditors and shareholders (*Curran* v. *Arkansas*, 15 How. 304; *Bacon* v. *Robertson*, 18 How. 480 486, *et seq.*; *Lum* v. *Robertson*, 6 Wall. 277, 279; *Shields* v. *Ohio*, 95 U. S. 319, 324; *Farrington* v. *Tennessee*, 95 U. S. 679, 687; *Greenwood* v. *Freight Co.*, 105 U. S. 13, 19; *Kinkead* v. *United States*, 150 U. S. 483, 511). Upon the dissolution of a corporation, the corporate assets belong to the shareholders as tenants in common (*Pewabic Mining Company* v. *Mason*, 145 U. S. 349, 356), and the relations between the shareholders become analogous to the relations of partners (*Mason* v. *Pewabic Mining Company*, 133 U. S. 50, 59). Where the corporate debts have been paid, it has

been held that the stockholders obtain a legal title to the remaining corporate property and may do with it as they see fit (*Stearns Coal & Lumber Co.* v. *Van Winkle*, 221 Fed. Rep. 590, 596). These principles are applied in equity irrespective of statute (*Gardiner* v. *Automatic Arms Co.*, 275 Fed. 697, 700; *Boyd* v. *Hankinson*, 92 Fed. 49, 55; *Greenwood* v. *Freight Co.*, 105 U. S. 13, 19). Granted that the Soviet government had the power to terminate the existence of Russian insurance companies and to confiscate such of their corporate assets as were actually in Russia, title to the corporate assets outside of Russia thereupon became vested in the shareholders as tenants in common, subject to payment of creditors, and the Soviet decrees were as powerless to confiscate such assets as they undoubtedly were powerless to reach other property of individuals in this country, whether such individuals are Russian nationals or nationals of other countries. Alien friends as well as citizens are entitled to the protection of the Fifth Amendment of the Constitution (*Russian Volunteer Fleet* v. *United States, supra*, p. 489, and cases there cited).

If, as petitioner asserts, the Litvinoff assignment purported to assign and the President of the United States purported to accept an alleged foreign confiscator's title to property located in the United States, the assignment to such extent is nugatory as contrary to our public policy against the recognition or enforcement of a confiscator's title. The petitioner denies this by the assertion that the acceptance of the assignment by the Executive constituted in itself an authoritative declaration binding on the courts to the effect that the Soviet decrees of confiscation are not opposed to our public policy. This strange doctrine in the first place begs the question of

the construction of the assignment, discussed elsewhere in this brief. Moreover, a conclusive answer thereto is that the assignment does not mention at all such decrees of confiscation. In the second place it is not the business of the President to declare our public policy in this respect and such doctrine is directly contrary to the decisions of this Court holding that our public policy is to be found in the Constitution, the statutes and the course of administration and decision (*License Tax Cases,* 5 Wall. 462, 469; *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 340; *St. Louis Mining Co.* v. *Montana Mining Co.,* 171 U. S. 650, 655). The Executive act represented by the acceptance of the Litvinoff assignment, even if regarded as an act within the treaty power, does not determine public policy contrary to express prohibitions of the Constitution (*Geofroy* v. *Riggs,* 133 U. S. 258, 267); *The Cherokee Tobacco,* 11 Wall. 616, 620-621). The Executive having no authority in peace or war to confiscate property (*Brown* v. *United States,* 8 Cranch. 110; *Miller* v. *United States,* 11 Wall. 268, 310), it follows that the Executive has no power by indirection to override our public policy by an alleged acceptance of title to property in the United States based upon the confiscatory decrees of a foreign government. The application and enforcement of such Soviet Confiscatory decree is no less contrary to the provisions of the Fifth Amendment because instituted by the Executive and not by the Congress (*Home Telephone and Telegraph Company* v. *Los Angeles,* 227 U. S. 278). The question of public policy in such a case as this is for the courts, not the Executive.

**D. Fallacies of Petitioner's Arguments as to the Effect of the Soviet Decrees**

1. The primary question in this case is not that of the title of shareholders and creditors but that of the title of the Soviet government. The title of the Soviet government is not improved by petitioner's attack on the rights of creditors and shareholders. But meeting such attack, the basic contention of petitioner is that the law of Russia as the law of the State of incorporation is the sole criterion for the determination of the rights or absence of rights of corporate creditors and shareholders of Russian corporations in and to the corporate assets outside of Russia. In support of such contention, petitioner cites certain decisions of this Court holding that the relations between a corporation and its members are regulated by the law of the State of incorporation. Recognition of foreign laws of *regulation* between corporate members, however, is not the same as recognition of foreign laws of *total destruction* of such relations. Moreover, all the cases cited by petitioner in this connection are cases based upon the application of the full faith and credit clause of the Federal Constitution not here applicable, except the case of *Canada Southern Ry.* v. *Gebhard,* which was clearly based upon the harmony existing between the Canadian law relative to a company in financial difficulties and our own laws of foreclosure and bankruptcy. That we do not recognize and enforce extraterritorially a foreign law of the total destruction of the rights of corporate members is shown by the decision of this Court in *Second Russian Insurance Company* v. *Miller, supra,* which held that a Russian ukase forbidding relations between Russian and German nationals valid by German and by New York law, would not be given extraterritorial

effect to the destruction of the contract rights of German nationals. In that case, this Court, distinguishing the *Canada Southern Ry.* case, said at page 560:

> "Nor does Canada Southern Ry. Co. *v.* Gebhardt, 109 U. S. 527, relied upon by appellant, support the contention. That case only laid down the doctrine recently affirmed by this Court (Modern Woodmen of America *v.* Mixer, 267 U. S. 544) that the legal relations of the members of a corporation to the corporation and to each other must be regulated and controlled by the law of the jurisdiction in which the corporation is organized, and it extended the doctrine so as to make it applicable to mortgage security holders having a common interest in the corporate property. The Russian ukase however did not purport to regulate the internal relations of the corporation to its members or lien holders. By its terms it is applicable indiscriminately to individuals and all classes of associations and corporations, and apparently undertakes to deal with contracts of every kind. It cannot be brought within the purview of the rule established in Canada Southern Railway Co. *v.* Gebhardt and Modern Woodmen of America *v.* Mixer, supra."

If the Canadian law under review in the *Canada Southern Railway* case had attempted to abrogate entirely the rights of bondholders, it cannot be doubted that this Court would have refused to enforce such law in our courts.

The principle that persons may be recognized as having certain capacities in this country which may not be accorded to them at the domicile is well illustrated in the case of *Polydore* v. *Prince*, 19 Fed. Cas. No. 11257 (cited by this Court in *Second Russian Insurance Co.* v. *Miller, supra*), where it was held that a slave domiciled in

Guadaloupe has all the capacities of a free man in a jurisdiction where slavery is not allowed. Even though it should be held in a suit against the Moscow Company or its representative or depositary that as to shareholders domiciled in Russia, and as to creditors whose claims accrued in Russia, the Soviet decrees of confiscation must be recognized, nevertheless such a holding would not improve petitioner's title. Furthermore, it will be noted that the complaint herein makes no distinction between the rights of creditors whose claims accrued in Russia and shareholders who are Soviet nationals and others. Clearly, as to creditors whose claims accrued outside of Russia (*Second Russian Ins. Co.* v. *Miller, supra*) and as to shareholders domiciled outside of Russia (*Disconto Gesellschaft* v. *U. S. Steel Co.*, 267 U. S. 22; *Russian Commercial & Industrial Bank* v. *Comptoir D'Escompte De Mulhouse*, L. R. 1925, A. C. 112, 125), the confiscatory decrees of the Soviet government case have no application as to their rights to assets located outside of the territorial jurisdiction of Russia.

2. The petitioner fails to discriminate between confiscation of property located within the territorial jurisdiction of the confiscating government and alleged confiscation of property located without such territorial jurisdiction. In every case of confiscation cited by petitioner, the property confiscated was property within the territorial jurisdiction of the confiscator and the decisions of this Court upholding title derived from the confiscator laid stress upon the fact that the property was within the territorial dominion of the confiscator. Likewise in the English case of *Luther* v. *Sagor*, relied on by petitioner, the property confiscated was within Russia and title by confiscation was upheld solely on that ground.

3. The argument of petitioner on the question of public policy is fundamentally fallacious. Here the United States is attempting to act as a collection agency for the Soviet government in the application and enforcement in our courts of foreign confiscation decrees as against property in the United States. The United States is the moving party and if it succeeds, it will, by its own action, have taken without compensation the property in this country belonging in part to American citizens and in part to friendly aliens—all contrary to the provisions of the Fifth Amendment. The Executive in purporting to act on behalf of the United States in the enforcement of the Soviet decrees is acting in violation of the Constitution (*Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278). The United States is here attempting to use the Soviet decrees as a sword and not as a shield or defense. While in a proper case, the Soviet decrees may doubtless be invoked as a defense to a cause of action accruing in Russia, far different considerations apply to the use of foreign decrees as the basis of a cause of action (*Bradford Electric Co.* v. *Clapper*, 286 U. S. 145, 160). A domestic court may always deny affirmative relief based on a foreign statute where such foreign statute is penal or contrary to local public policy (*Bradford Electric Co.* v. *Clapper, supra*, p. 160).

The petitioner's argument that the property in question is that of a sovereign begs the question. That is one of the questions to be decided by this Court. Nor is it material on the question of public policy that the United States is purporting to act as the assignee of a foreign sovereign. Even in the conduct of foreign relations, the Executive may not violate the Constitution (*Geofroy* v. *Riggs, supra; The Cherokee Tobacco, supra; In re Beale,*

2 F. Supp. 899, aff'd 71 Fed. (2d) 737). That the United States as a party litigant in commercial matters is bound by the rules governing other litigants has frequently been decided by this Court (*Standard Oil Co.* v. *United States,* 267 U. S. 76; *United States* v. *The Thekla,* 266 U. S. 328; *Chesapeake & Delaware Canal Co.* v. *United States,* 250 U. S. 123, 126; *Cooke* v. *United States,* 91 U. S. 389, 398). The equities of the United States are no greater than those of a private litigant in like circumstances (*Folk* v. *United States,* 233 Fed. 177, 192; *United States* v. *Midway Northern Oil Co.,* 232 Fed. 619, 631; *Sweet* v. *United States,* 228 Fed. 421, 428; *Chase* v. *United States,* 222 Fed. 593, 596).

### E. Analogy of the English Law

The petitioner relies on certain English cases. Such cases have no application to the instant case. On the contrary, the English law is in harmony with the contentions of the respondent.

The case of *Luther* v. *Sagor* (1921), 3 K. B. 532, involved the title to tangible property seized in Russia by the Soviet government and subsequently imported into England by the purchaser from the Soviet government. Under these circumstances, the English court, after recognition of the Soviet government by England, held, on authority of *Oetjen* v. *Central Leather Co.,* 246 U. S. 297, and *Underhill* v. *Hernandez,* 168 U. S. 250, that the purchaser from the Soviet government obtained a good title. The basis of the decision, as in the decisions of this Court, cited as authority, was that the property confiscated was actually located in Russia and therefore subject to Russian dominion.

The case of *Lazard Bros. & Co.* v. *Midland Bank, Ltd.* (1933) A. C. 289, decided only that the defendant Banque Industrielle de Moscou, a Russian bank, was not in existence in October, 1930. The court did not purport to construe the Soviet decrees of confiscation or to adjudicate the effect of such decrees upon property in England. Lord Wright, in the course of his opinion, at page 302, expressly stated that "No question is here involved of the extraterritorial effect of legislation, confiscatory or otherwise * * *." He further said, on the same page: "Nor do I think it necessary to express any opinion about the status of assets in England, a matter not in these proceedings, but which no doubt will need full consideration in the future." The consideration in the future as to assets in England, referred to by Lord Wright, was given in the subsequent case of *Russian Bank for Foreign Trade* (1933), Chancery Division 745. In that case, MAUGHAM, *J.*, said, in the course of of his opinion:

> "the decrees, as is admitted by both experts, were of a confiscatory character (p. 763) * * *. If the debt was primarily recoverable in London, I am of opinion that it was not affected by the Soviet legislation, even though it was due to a person who was a Russian subject at the date of the nationalization decrees. Its locality must be taken to be the place where the debt was in the ordinary course recoverable (citing authorities). The decrees in question could not according to our laws have the effect of extinguishing the debt if locally situate here, or of transferring it to the Soviet Republic; (p. 767) * * *. Of course, if I am right in thinking that the nationalization decrees have no extra-territorial operation, the R.S.F.S.R. have no claim to any of the property which is involved, and as I have pointed out this seems to be their own view" (p. 770).

In *Sedgwick Collins & Co.* v. *Rossia Insurance Co. of Petrograd* (1926), 1. K. B. D. 1, SARGANT, *L. J.*, said, at page 15:

> "Nor do I think that the position of creditors here as against property of the Rossia Insurance Company here, such as debts owing to them from debtors in this country, is altered by legislation or decrees of the Russian sovereign power which 'nationalized' the undertaking and assets of the Rossia Insurance Company, that is, as I understand it, purported to transfer these assets from their private proprietors to the Russian nation as a whole. Effective as such legislation may be within the limits of Russian territory, it cannot determine the ownership of property locally situate in this country, such as debts owing from debtors here; see Dicey, Conflict of Laws, 2nd ed., p. 310, and Lecouturier *v.* Rey (3), an analogous case with reference to the goodwill of a trade mark or trade name in England."

In the *Jupiter* (No. 3) (1927) P. 122, aff'd by the Court of Appeal (1927 P. 250), it was held that the ownership of a steamship belonging to a nationalized Russian company but not within Soviet territory did not pass to the Soviet government under its decrees of confiscation. In the lower court, HILL, *J.*, said, at page 144: "As to the second question—that is, the question whether the decrees transferred the property wherever situated—it was not suggested that ships were to be governed by any principles other than those applicable to other chattels. If the Jupiter was not within the territory of the R. S. F. S. R., I do not see how the mere passing of a decree could transfer the property. This seems to me to be recognized in all the cases." On appeal, the judgment rendered by HILL, *J.*, was approved in all respects. LAWRENCE, *L. J.*, said,

page 255: "In my opinion the determining factors in this case are: (1) That the nationalizing decrees of the U.S.S.R. do not operate on property outside the territory of that Republic, whether such property belonged to a Russian citizen or not * * *."

In *Russian Commercial and Industrial Bank* v. *Comptoir D'Escompte DeMulhouse* (1925) A. C., 112, 125, Viscount Cave said: "I am unable to understand how such an order could be effective to confiscate or destroy shares held by persons out of the jurisdiction of the Soviet Government."

## II

**Under well settled principles of law concerning the construction of diplomatic acts of transfer of property, any alleged title to the property here in question has not been assigned to and accepted by petitioner, United States.**

This question involves the construction of an exchange of letters between the President and the Soviet representative, Mr. Litvinoff (R. 20-22), and particularly what undertakings the President is to be deemed to have assumed for the United States by such correspondence.

Petitioner contends that by such correspondence the United States became the owner by assignment of a claim or title of the Soviet government, based upon its confiscatory decrees, to property located in a State of the United States. If this be so in the instant case, then such assignment covers any right, title or interest of any former Russian corporation or any Russian national at the dates of such decrees wherever he may now be, in

any property in this country. If this be so, then the United States has become the collection agency of such claims for the Soviet government and is under an obligation to seek out such rights (as it is now doing) and to bring suit at its own expense in each and every one of such cases so discovered, where payment or delivery is refused, with consequent infirmities in titles here if petitioner is sound in its contentions as to the construction of such assignment and as to extraterritorial title by confiscation.

Respondent contends that the proper construction of such diplomatic assignment is that it covers funds or claims due to the former Russian Imperial or the "Kerensky" governments and does not cover any interest in the property now in question; that by a previous assignment, dated August 25, 1933, by a Russian financial attaché (Mr. Serge Ughet) accredited to Washington by the Imperial and "Kerensky" Russian governments, which assignment was specified in petitioner's bill of particulars as one of the instruments of assignment on which petitioner relies (R. 18), the assigned property was specified as "formerly belonging to either the Imperial Russian Government or the Provisional Russian Government" (the so-called "Kerensky" government) (R. 19); that the words "or otherwise" in the "Litvinoff" letter (R. 20) are not sufficient to extend so enormously the scope of such assignment; that in the face of decisions of this Court that, in the case of diplomatic assignments affecting non-enemy nationals, private property of nationals of the assignor government always will be recognized and protected, the President will not be deemed to have accepted and assumed for the United States such burden of collection; that the assignment is at least ambiguous

in the respect now invoked; and that even in the case of solemn treaties "no construction of a treaty, which would impair that security to private property, which the laws and usages of nations would without express stipulation have conferred, would seem to be admissible further than its positive words require" (*Strother* v. *Lucas,* 12 Pet. 410, 438).

### A. Question of Construction Is Matter for Judicial Determination

Petitioner contends in effect that the assignment means whatever the Executive department or its law officers say it means and that the courts have no function in any case where the United States is a complainant except to stamp with approval whatever assertion the Executive's representatives may make. As the contention is stated by petitioner, it is that the courts should adopt the interpretation placed upon it by both of the high contracting parties, to ascertain which, if doubt exists, application should be made to the Secretary of State. The mere bringing of this suit is claimed by petitioner to be such alleged interpretation. The law is not to such effect. As said by the District Court, "The suggestion of the Government that the 'Litvinoff' assignment is not open to judicial construction requires little comment, for clearly where private rights are concerned, the mere assertion of the Government that the suit should be commenced does not preclude the courts from determining as a judicial matter the true meaning of the instrument involved." If a solemn treaty, with the opportunity for public examination by the Senate, is open for judicial construction, how much more should be an Executive agreement affecting private rights.

The question of what Mr. Litvinoff actually did assign and what the President is to be deemed to have *accepted* for the United States under the law as declared by this Court, is a judicial question.

**B. Principles Concerning the Construction of the Transfer of Property by Diplomatic Action**

It is a fundamental principle of our law that, in the case of diplomatic assignments affecting non-enemy nations, private property of nationals of the assignor government always will be recognized and protected (*U. S.* v. *Percheman,* 7 Pet. 51, 87; *Strother* v. *Lucas,* 12 Pet. 410, 438; *Coffee* v. *Groover,* 123 U. S. 1, 9; *Kinkead* v. *U. S.,* 150 U. S. 483).

In *Strother* v. *Lucas, supra,* it was said, "No construction of a treaty, which would impair that security to private property, which the laws and usages of nations would without express stipulation have conferred, would seem to be admissible further than its positive words require." In *Kinkead* v. *United States, supra,* the court construed the terms of the cession of Alaska by Russia to the United States in 1867. It was conceded by the Government in that case that the cession was not intended to transfer title to the United States of any private property, the only point being whether a building permanently erected by a semi-public Russian corporation, since dissolved, upon Russian government land passed into the ownership of the United States. Even upon this apparently simple point, the court was divided in its view. In his dissenting opinion, Mr. Justice SHIRAS, with whom Mr. Justice FIELD concurred, made the following observation, which is applicable in the present case to the shareholders and creditors of the Moscow Company:

> "Even when corporations are dissolved by writs of *scire facias* or decrees in equity, at the suit of the sovereign, their moneys and property not essential to the exercise of their franchises are not forfeited, but are left to the ownership of the stockholders" (p. 511).

Treaties between nations are to be construed as best to conform to the accepted principles of international law and not in derogation thereof (*Vilas* v. *City of Manila,* 220 U. S. 345). Treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals (*Sullivan* v. *Kidd,* 254 U. S. 433, 439), and it is expected that their provisions will be expressed in unmistakable terms (*Rocca* v. *Thompson,* 223 U. S. 317, 332).

A treaty cannot change the Constitution or be held valid if violating the Constitution (*The Cherokee Tobacco,* 11 Wall. 616, 620-621; *In re Beale,* 2 F. Supp. 899, affirmed 71 F. (2d) 737). In the *Cherokee* case, *supra,* the Court said (620-621), "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our Government."

### C. The "Litvinoff" Assignment

The "Litvinoff" assignment of November 16, 1933 (complainant's bill of particulars (R. 20-22), purports to assign to the petitioner United States, and the President's reply of the same date accepts assignment of, "all such amounts", such "amounts" being previously expressed as follows:

The Soviet government "agrees that, preparatory to a final settlement of the claims and counter-claims between

the" Soviet government and the U. S. "and the claims of their nationals", the Soviet government "will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due" (the Soviet government, R. 20) "as the successor of prior Governments of Russia, or otherwise, from American nationals * * * and will not object to such amounts being assigned and does hereby release and assign such amounts."

If it were not for the words "or otherwise", petitioner would not have the slightest arguable ground, as without these words the assignment clearly relates to amounts admitted to be due or found to be due the Soviet government "as the successor of prior Governments of Russia" from American nationals. Without these words "or otherwise" the assignment would cover exactly what was covered in the "Ughet" assignment shortly before (R. 19). This "Litvinoff" assignment undoubtedly covered amounts due the Soviet government as the successor of prior governments of Russia. This is all that was held in *State of Russia* v. *National City Bank*, 69 F. (2d) 44. These words "or otherwise" are merely the usual general precautionary words covering, in this case, any possible derivative governmental interests of the Soviet government in and to property in this country not included in the property held by the recognized Imperial and Kerensky governments of Russia; such, for instance, as property held in the United States by the *de facto* but unrecognized Siberian government of Admiral Kolchak (*cf. Nankivel* v. *Omsk All Russian Government*, 237 N. Y. 150) or by the *de facto* but unrecognized South Russian regime of General Denikin (*cf. Voevodine* v. *Government Etc. South of Russia*, 232 App. Div. 204). It is neither necessary nor proper to extend the meaning of these

words "or otherwise" to include alleged claims based upon alleged extraterritorial application of the Soviet decrees of confiscation.

Furthermore, the respondent never was a debtor to the Soviet government or to prior governments of Russia. Respondent's obligation runs to Paul Lucke as conservator of the property of the former Russian corporation, by direction of the N. Y. State Court of Appeals and the order of the state court thereon (*Matter of People—Moscow Fire Ins. Co.* 255 N. Y. 433, 435), which court had the actual possession of the property, through the Superintendent of Insurance as the statutory liquidator or receiver *pendente lite*, and could do as it pleased with it. The state court order first directed that the property now in question be delivered to Mr. Lucke as conservator of the former Russian corporation's property, upon his giving a bond, to apply such property to the use of the corporation, its creditors and shareholders (R. 25). As an alternative to this the order directed the existing situation (R. 26).

Is the enormously broad scope of the assignment claimed by petitioner, to be predicated upon these words "or otherwise" and, especially in view of the law as laid down by this Court, is the President by his acceptance to be deemed to have imposed the consequent responsibilities upon the United States as such collection agency?

Petitioner argues that the agreement of the Soviet government not to sue in our courts (R. 20) requires the construction that all claims of whatever nature were assigned to the assignee, the United States. This argument simply begs the question. The question is as to what is to be deemed to have been *accepted* by the President, presumably acting in view of the law as laid down by this Court.

Petitioner challenges the holding of the District Court that these funds are not to be deemed as due to the Soviet government from American nationals (R. 83). These funds were assets of the Russian corporation which, by decision of the highest court of New York, belonged, as the case might be, either to such corporation if it existed or if not, then had passed to the successor of such corporation—to Paul Lucke as the conservator of the corporation's property in trust for its creditors and shareholders (*Matter of People—Northern Ins. Co.—Moscow Fire Ins. Co.*, 255 N. Y. 433, 435, R. 25) which assets the court, in lieu of a bond, placed in the custody of the respondent as the agent or depositary of such corporation if it existed or if not, then of said Paul Lucke as such conservator (R. 26). Respondent is merely a bailee, without title, and the funds are not due "from American nationals" within the sense of the assignment and its acceptance.

It is further contended by the petitioner that the institution of these suits by the petitioner, a fact which petitioner's brief asserts is well known to the assignor, indicates the intent of the parties to the assignment and is equivalent to a construction of the assignment by the acts of the parties. In other words petitioner contends that this Executive agreement means whatever the Executive department says it means. In such a view the courts have no function whatsoever in any case where the United States is a party, even as assignee, except to stamp with their approval whatever assertion counsel may make on behalf of the Executive. The statement of the proposition is its own refutation. As said in the opinion of the District Court (R. 83-84):

> "The suggestion of the Government that the Litvinoff assignment is not open to judicial con-

> struction requires little comment, for clearly where private rights are concerned, the mere assertion of the Government that suit should be commenced does not preclude the courts from determining as a judicial matter the true meaning of the instrument involved. There is nothing in State of Russia *v.* National City Bank, 69 F. (2d) 44, holding to the contrary; and the statement on page 48 of the opinion that 'Our courts must accept the assertion of the government of the United States as to the effect of an assignment,' mean nothing more than that the authority of Mr. Litvinoff to make the assignment, and the right of the United States to accept it, will not be questioned by our courts. The word 'effect' as used in this excerpt from the opinion, was not intended to preclude judicial interpretation of the language of the instrument itself." (Italics ours.)

The case of *State of Russia* v. *National City Bank, supra*, was a case of a "government account" (p. 46), of money due to a pre-Soviet government of Russia.

Finally, it would seem that the Soviet government in the concluding part of the instrument of November 16, 1933 (R. 20) expressly relinquished any claim with respect to judgments rendered or that may be rendered by American courts in so far as they relate to property or rights or interests therein which the Soviet government or its nationals may have had or may claim to have had an interest. This relinquishment is general and not merely in favor of the United States. The relinquishment in favor of the United States is separate and is found in the first paragraph of the instrument—in the assignment clause itself—wherein the Soviet government agreed not to take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to

be due or that may be found to be due—such amounts being assigned to the United States. Prior to the date when the instrument of November 16, 1933 was executed, the New York Court of Appeals by a final non-appealable decision had decided that the funds in New York of Russian insurance corporations should be distributed to and among the corporate creditors and shareholders. All the proceedings in the state courts thereafter were merely for the purpose of carrying out the decision of the Court of Appeals. Even the dissenting judge in the Circuit Court of Appeals held that upon matters which were *res adjudicata* on November 16, 1933, recognition of Soviet Russia could have no disturbing effect (R. 108).

### D. The "Ughet" Assignment

This "Ughet" assignment, although specified in the petitioner's bill of particulars (R. 18-20) as one of the instruments of assignment upon which petitioner relies, was not referred to by petitioner upon either argument below, nor in its present brief.

Mr. Serge Ughet was the financial attaché of the Russian Embassay of which Mr. Boris Bakhmeteff was the Ambassador, accredited to the United States on July 5, 1917, by the Russian Provisional (Kerensky) government (see letter from Secretary of State dated September 24, 1934 and accompanying authenticated copy of letter of Secretary of State, Charles E. Hughes, dated April 29, 1922 (R. 75-76), of which facts as therein stated the court takes judicial notice; see also *State of Russia* v. *National City Bank of New York,* 69 F. (2d) 44; *Lehigh Valley R. Co.* v. *State of Russia,* 21 F. (2d) 396, 400).

This "Ughet" instrument of assignment dated August

25, 1933 (R. 18-20), after purporting to assign certain specified claims, not material here, contains the following provision (R. 19):

> "The foregoing list of claims is not intended to be exclusive. It is the intention of this assignment to transfer to the United States of America all property, rights and claims having a situs in the United States formerly belonging to either the *Imperial Russian Government or the Provisional Russian Government*" (italics ours).

The title which the complaint alleges (par. 4, R. 3) the "Russian State" had, was acquired by confiscation and appropriation "in the latter part of 1917 and the early part of 1918 or thereabouts". Petitioner's second bill of particulars shows that this refers to the decrees of December 1918 and thereafter (R. 23, 26-33) of the Soviet government which succeeded the Russian Provisional (Kerensky) government, which had succeeded the Imperial Russian government. The property for which Mr. Ughet was custodian was the governmental property formerly in charge of the Provisional (Kerensky) Russian Government's Ambassador, Mr. Boris Bakhmeteff. This is shown by Secretary of State Hughes' letter to Ambassador Bakhmeteff of April 29, 1922, where it is said: "After this date the custody of the property of the Russian Government in this country for which you have been responsible will be considered to vest in Mr. Serge Ughet, the financial attaché of the Embassy" (R. 76).

This "Ughet" assignment does not transfer and could not transfer the funds here in question.

## III

**The District Court did not have jurisdiction of the instant suit.**

The chronology of the several extrinsic jurisdictional facts are as follows:

*1925.* N. Y. state court: Liquidation proceedings brought by the N. Y. Superintendent of Insurance and appointment of Superintendent as liquidator of property of Moscow Company in the State of New York, namely, ancillary receiver (receiver *pendente lite*) under section 63 of the N. Y. Insurance Law (subds. 4 and 5).

*1931.* N. Y. state Court of Appeals rendered decisions determining disposition of surplus funds so held by Superintendent as ancillary receiver (*Matter of People* (*Russian Reinsurance Co.*), 255 N. Y. 415; *Matter of People* (*Northern Ins. Co.—Moscow Fire Ins. Co.*), 255 N. Y. 433, 435).

*April 18, 1933.* N. Y. Superintendent of Insurance delivered funds to respondent (R. 7).

*April 19, 1933.* N. Y. state court: Suit commenced by Paul Lucke as surviving director of the Moscow Company and conservator of its property by designation of the N. Y. Court of Appeals, in his own name as well as the name of the Moscow Company against the respondent and 143 others (creditors, shareholders, or their next of kin), to determine the disposition of the funds (R. 11).

*November 16, 1933.* Recognition and alleged assignment by "Litvinoff" correspondence (R. 20).

*August 22, 1934.* N. Y. state court: Entry of judgment in suit brought by Paul Lucke (R. 45).

*August 22, 1934.* U. S. district court: Filing of instant suit, being a claim to the entire property so received by the respondent (R. 2).

**A. The Prior N. Y. State Court Proceedings are *in Rem*.**

On April 19, 1933, prior to recognition, there was begun in the Supreme Court of New York a suit to determine the disposition of the property deposited with the respondent the day before (R. 11, 16). One of the two plaintiffs was Paul Lucke, the sole surviving director of the former Russian corporation and conservator of its property (R. 7, 11; *Matter of People (Northern Ins. Co.—Moscow Fire Ins. Co.)*, 255 N. Y. 433, 435). "Directors less than a quorum may be treated as conservators of the property of their companies when there are assets within the State that might otherwise be lost" (*Matter of People, supra,* 435). To the name of such plaintiff Lucke, as such conservator, was added the name of the Moscow Company. The defendants were the respondent and 143 other parties, such other parties being creditors or shareholders (or their executors, administrators or next of kin) of the Moscow Company.

By such suit the state court obtained jurisdiction and constructive control of the property. The nature of such suit was *in rem* or *quasi in rem*. As the order in the liquidation proceeding had directed that the funds deposited with the respondent were not to be withdrawn except upon the order of a court of competent jurisdiction (R. 26, *Matter of People (Northern Ins. Co.—Moscow Fire Ins. Co.)*, 255 N. Y. 433, 435) and as the funds were in safe custody with the respondent, there was no necessity for

the appointment of any receiver, which would have been wasteful.

***Petitioner's Contentions and Their Refutation***

(a) Petitioner's brief (p. 78) asserts that the ground —and inferentially the only ground—upon which respondent claims that the proceedings in the state are *in rem,* is that such proceedings are supplemental to, and a continuation of, the liquidation proceedings instituted by the Superintendent of Insurance. Respondent does not so claim. The respondent's contention is that when, on April 19, 1933, Paul Lucke, the surviving director of the Russian corporation and conservator of its property, began the pending suit in the state court for a determination of the disposition of these funds (R. 11-17), the state court then obtained jurisdiction, and that such suit was in its nature one *quasi in rem,* which jurisdiction may not be ousted or superseded by a subsequent suit in the federal court, likewise in its nature *quasi in rem* as is the instant suit. It thus becomes unnecessary to discuss whether or not such suit by Paul Lucke may or may not be regarded, under all the circumstances, as a continuation of the liquidation proceedings as directed by the N. Y. Court of Appeals. In this connection, petitioner's brief contends (p. 78) that the state court's authority in the liquidation proceedings ended when the Superintendent had paid the domestic policyholders. The answer to this suggestion is that the N. Y. Court of Appeals said the Superintendent's authority and jurisdiction did not so end and the court told him to go ahead with the claims of non-U. S. creditors (*Matter of People (Russian Reinsurance Co.)*, 255 N. Y. 415, 427, 422-424; cf. *Matter of People—City Equit. Fire Ins. Co.*, 238 N. Y. 147, 156).

The expression of a federal district court in the second circuit in *Farrell* v. *Stoddard* (1 F. [2d] 802, 803), referred to by petitioner, as to a different status of the N. Y. Superintendent of Insurance under the state statute, was made prior to the contrary view of the N. Y. Court of Appeals (*Matter of People* [*Russian Reinsurance Co.*], 255 N. Y. 415, 424, 423); and is contrary to recent decisions of the Circuit Court of Appeals, 2d Circuit (*Jacoby* v. *Bond & Mortgage Co.*, 72 F. (2d) 420, 423; *Tolfree* v. *N. Y. Title & Mortgage Co.*, 72 F. [2d] 702, 704).*

The state court, so appointing the N. Y. Superintendent of Insurance as liquidator or ancillary receiver (receiver *pendente lite*), had full and exclusive power over such property. As said by an able equity judge (WALLACE, *J.*, in *Sands* v. *E. S. Greeley & Co.*, 88 Fed. 130, 133):

> "When it appoints a receiver, the officer becomes its officer, and is completely amenable to its control, and it matters not whether he is called an ancillary receiver or merely a receiver. His title to the assets within the jurisdiction is derived from its decree, and does not depend upon comity. The assets are in its custody, and are to be disposed of as equity and the orderly administration of justice require. Its judgments and decrees in respect to these assets must be accepted as conclusive by all other courts. 'Where a receiver, administrator, or other custodian of an estate is appointed by the courts of one state, the courts of that state reserve

* In each of these cases it is said: "By virtue of the order and article II of the Insurance Law the Superintendent became in effect a receiver under the supervision of the state court and the property under his control became in custodia legis" (citing cases). "In such circumstances, under established rules of law, the federal courts should not interfere with the possession of the state court" (citing cases). Article XI of the Insurance Law (L. 1932, ch. 191, secs. 400-428) now includes what was formerly sec. 63 of the old statute without material change. See new sections 406 and 408.

> to themselves full and exclusive jurisdiction over the assets of the estate, within the limits of the state.' Reynolds *v.* Stockton, 140 U. S. 254, 11 Sup. Ct. 773. It rests in the discretion of the court appointing the receiver whether the assets within its jurisdiction shall be distributed under its own direction or shall be transmitted to the primary receiver. U. S. *v.* Coxe, 18 How. 105."

The N. Y. Court of Appeals, in the very cases of these Russian insurance companies, held that, in these liquidation proceedings under section 63 of the Insurance Law, there was jurisdiction to go beyond the determination of the claims of the beneficiaries of the trusts for policyholders and so-called U. S. creditors, and to deal with the surplus, to determine and pay the claims of non-U. S. creditors, namely, those creditors not specifically protected by such insurance trusts. In *Matter of People* (*Russian Reinsurance Co.*), 255 N. Y. 415, the court provided for the ascertainment and payment of such "creditors and policyholders with claims founded upon foreign business" (p. 422; pp. 422-424) as had presented or might present in the liquidation proceeding their claims; then directed that the surplus thereafter remaining should be transferred to the surviving directors, constituting a quorum of the board (p. 424). The court then went on to say (p. 427):

> "The State of New York is not charged with a duty to wind up the business of these Russian corporations. In aid of domestic creditors" (meaning U. S. creditors as particularly protected by the insurance trusts), "it winds up a branch of such business conducted within its borders and in submission to its laws (Matter of People [Norske Lloyd Ins. Co.], 242 N. Y. 248). This done, its

duty ends except to turn the surplus over to a competent custodian (Insurance Law, sec. 63). *We do not say that the refusal to go farther has its origin in what is strictly a defect of jurisdiction.* In this instance, at all events, there are considerations of convenience and efficiency that may be accepted as decisive, irrespective of the scope of power" (citing authorities) (italics ours).

(b) Petitioner's brief (p. 79) further contends that any jurisdiction of the state court over the *res* was lost when the funds were deposited with the respondent as agent or depositary of the Moscow Company and of Paul Lucke, its surviving director and conservator, not to be withdrawn except upon the order of a court of competent jurisdiction (R. 25-26). This may or may not be correct, but in view of the suit begun by Mr. Lucke on the day after such deposit (April 19, 1933, R. 11), it is not necessary to discuss whether such Lucke suit was independent of, or supplementary to, the liquidation proceedings, a suit, say, of the nature of surplus proceedings in a foreclosure suit.

(c) Petitioner's brief (pp. 79-83) contends that, if in ordinary cases the state court, upon the jurisdictional facts here shown, would have priority of jurisdiction, nevertheless the rule of priority of jurisdiction is not applicable herein, because the state courts lacked jurisdiction over the surplus funds in question, since they were formerly the property of a foreign sovereign and on November 16, 1933 became the property of the United States (p. 80). It is further suggested by petitioner that it is not necessary to determine the exact time when the state courts "ceased to have jurisdiction over the funds, because, as was suggested by Judge MANTON in his dissenting opinion, they ceased to have jurisdiction of such funds

on November 16, 1933, the date on which the Soviet government was recognized" (p. 83). The argument admits and asserts that the state courts possessed jurisdiction *only* for the purpose of paying the claims of domestic creditors and policyholders, which claims constituted a *lien* * upon the funds; and that after the Soviet government acquired title, it was beyond the power of any court or state officer, without the consent of the Soviet government, to place additional charges upon or adjudicate claims against such funds (p. 80).

The answer to all this is very simple. We are, in this point, considering the question of *jurisdiction* of the state court over a *res,* not the adjudication which the state court should make. In the liquidation proceedings the status of the Superintendent of Insurance was that of the receiver of the state court; the possession of the Superintendent was the possession of the state court. The *res* being thus in the possession of the state court, the state court had jurisdiction to do as it pleased with it (*Sands* v. *E. S. Greeley & Co.,* 88 Fed. 130), and the highest court of the state thereupon laid down the law applicable to such *res,* such adjudication directing to whom the property should go and to whom it should not go (the Soviet government) (*Matter of People, Northern Ins. Co.—Moscow Fire Ins. Co., supra; Matter of People, Russian Reinsurance Co., supra*). By the institution of the "Lucke" suit (R. 11) the state court obtained jurisdiction in *rem* over the same *res* so affected with the law as previously declared. Neither the "Litvinoff" correspondence of November 16, 1933, the date of recognition and on which the petitioner's alleged title is claimed to have arisen, nor the state court's

* Policyholders and creditors had no lien; they were beneficiaries of the statutory insurance trusts.

knowledge prior thereto of the Soviet regime and its confiscatory decrees which the court declined to recognize, could affect the state court's then *jurisdiction* of the *res* over which it had exclusive control. The situation is not that of suing a sovereign government without its consent, whether such sovereign government be *de jure* or *de facto*. The question of what principles of the public policy of the State of New York or of alleged principles of international law it should adopt was a matter for the discretion of the state court. A court always has jurisdiction even to err.

(d) Petitioner's brief contends that the state courts lacked jurisdiction to entertain suits involving the disposition of the surplus funds because at the time the state court suits (the liquidation proceedings and the Lucke suit) were instituted the funds were the property of a sovereign which had not consented to be sued. In support of this contention, petitioner asserts that the state courts possessed jurisdiction only for the purpose as stated in the New York statute, of paying the claims of domestic creditors and policyholders (that is, of the beneficiaries of the statutory insurance trusts), which claims constituted a lien upon the funds. The law of New York is the other way (*Matter of People—Russian Reinsurance Co.*, 255 N. Y. 415, 424; *cf. Matter of People—City Equit. Fire Ins. Co.*, 238 N. Y. 147, 156). The N. Y. Court of Appeals in the above case directed the ascertainment and payment of such "creditors and policyholders with claims founded upon foreign business" (pp. 422-424) as, in the liquidation proceedings had presented or might present their claims; then directed that the surplus thereafter remaining should be transferred to the surviving directors, constituting a quorum of the board (p. 424). The court then went on to say (p. 427):

> "The State of New York is not charged with a duty to wind up the business of these Russian corporations. In aid of domestic creditors" (meaning U. S. creditors as particularly protected by the insurance trusts), "it winds up a branch of such business conducted within its borders and in submission to its laws (Matter of People (Norske Lloyd Ins. Co.), 242 N. Y. 148). This done, its duty ends except to turn the surplus over to a competent custodian (Insurance Law, sec. 63). *We do not say that the refusal to go farther has its origin in what is strictly a defect of jurisdiction.* In this instance, at all events, there are considerations of convenience and efficiency that may be accepted as decisive, irrespective of the scope of power" (citing authorities).

So also in *Matter of People—City Equit. Fire Ins. Co., supra,* the Court said:

> "The Superintendent is not, therefore, to take possession of the property solely for the benefit of creditors or policyholders in this state or in the United States but for the interest of all its policyholders, creditors and stockholders wherever they may be. He is to liquidate the business here for that purpose."

The cases cited by petitioner do not determine that where a foreign sovereign or its property is involved, there is no *jurisdiction* in the court to which is presented a question relating to that sovereign or its property. Jurisdiction, in the sense of power to adjudicate the controversy, is, without question, present. Such courts, having such jurisdiction and power, decline to exercise it in certain cases. Even where such court so abdicates its power to function, it always decides, as a preliminary matter, the essentially judicial question of whether or not there is the

attribute of sovereignty attaching to the property (*The Jupiter* [No. 3], 1927, P. 122, 137-140). All of the cases cited by the petitioner are either cases where the ship libelled was admittedly the property of a foreign sovereign or were cases directly against a foreign sovereign, or against the property of that foreign sovereign, no one questioning the title.

### B. The Nature of the Instant Suit is *Quasi in Rem*, Not *in Personam*

That the prayer in the complaint in the instant suit is for an accounting does not make the suit one *in personam* for the reason that where a state court has first acquired jurisdiction *in rem*, a federal district court has no jurisdiction over the *res* or to direct an account (*Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33, 44-46). Therefore, as matter of law, the instant complaint may not be considered as a bill for an accounting.

The instant suit is brought for the purpose of asserting petitioner's title as "the sole and exclusive owner" (R. 4) to the *whole* of the funds now in the jurisdiction and control of the state court and not for the purpose of asserting any personal claim against the respondent other than as the depositary of such funds. As said by the court below (R. 92) "Nor is there any question here of the personal liability of the defendant (respondent) apart from what may attach solely from the fact that a fund in the custody of the state court, to which petitioner makes claim, has been placed in its custody under order of the state court." In such aspect the instant suit is one *quasi in rem*.

The case of *Riehle* v. *Margolies*, 279 U. S. 218, relied upon by the petitioner, has no application for the reason, as hereinbefore pointed out, that the petitioner in the instant case is not seeking to recover and cannot recover a personal judgment against the respondent. Moreover, in the *Riehle* case, the state court suit was commenced prior to the institution of the receivership proceedings in the federal court, and all that this Court decided was that the creditor had a right to prosecute to judgment such suit against the debtor *in personam*.

Petitioner's brief refers to the case of *Allen* v. *United States*, 285 Fed. 678, C. C. A. 1st, 1923. In that case, it was held that under the law of Massachusetts the state bank commissioner, in taking charge of the property of an insolvent bank, does not act in the capacity of a receiver and his possession is not the possession of a state court. In the instant case, the instituting of the "Lucke" suit in the state court for the disposition of the property in question (R. 11) vested that court with jurisdiction and constructive control over the property in question.

*Brown* v. *Duffin*, 13 F. (2d) 708 (1926, C. C. A. 6th), also referred to by petitioner, held that a suit for an accounting where no receiver had been appointed was a suit *in personam* and not *in rem* and that "a judgment that defendant first account, and then pay over, is a judgment *in personam*". It may be admitted that if the instant suit, in form for an accounting, had been the first to be brought, thus making the prayer for an accounting a proper one, it would be a suit *in personam*, and the prayer for an accounting would be regarded as determinative of the nature of the suit. But this Court has decided that a suit for an accounting in a federal court

cannot be maintained if brought subsequent to a suit *in rem* or *quasi in rem* in the state court, irrespective of a prayer in the bill for an accounting in such subsequent suit (*Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33, 44-46). Therefore, the fact that the prior and pending state court suit is a suit *quasi in rem* precludes, as matter of law, the instituting of a suit for an accounting in the federal court irrespective of the prayer in the bill in the instant subsequent suit. The recent decision of this Court in *Penn General Casualty Co.* v. *Pennsylvania* (294 U. S. 189) clearly states the law.

### C. Section 24 (1) of the Judicial Code Does Not Prevent the Application of the Usual Rule as to Concurrent Jurisdiction

Petitioner contends that Section 24(1) of the Judicial Code, as amended, C. 231, 36 Stat. 1091 (U. S. C. Title 28, Sec. 41(1),) is conclusive and controlling on the question of jurisdiction in the District Court.

The United States courts, other than the Supreme Court, have only such jurisdiction as Congress has granted to them. The above section of the Judicial Code provides that the district courts shall have original jurisdiction as follows:

> "First. Of all suits of a civil nature, at common law or in equity, brought by the United States; or by any officer thereof authorized by law to sue * * *".

But the jurisdiction of the federal courts in cases wherein the United States is a party, is not always an exclusive jurisdiction. This statute did not purport to remove any of the already existing jurisdiction in the courts of the several states. The state court had undoubted jurisdiction to determine the claim of the United

States as actually filed in the state court proceedings but not pressed therein (R. 50, 75; *Cotton* v. *United States,* 11 How. 229, 231; *Claflin* v. *Houseman,* 93 U. S. 130, 136; *Peoples Trust Co.* v. *United States,* 23 Fed. (2d) 381, 383; *Merryweather* v. *United States,* 12 Fed. (2d) 407).

The state court having acquired control of the *res* and having assumed jurisdiction to administer it, the United States, like any other party litigant, is bound by the numerous decisions of this Court to the effect that the jurisdiction of the court first in control will be respected. That the United States as a party litigant in commercial matters is bound by the rules governing other litigants, has frequently been decided by this Court (*Standard Oil Company* v. *United States,* 267 U. S. 76; *United States* v. *The Thekla,* 266 U. S. 328; *Chesapeake & Delaware Canal Co.* v. *United States,* 250 U. S. 123, 126; *Cooke* v. *United States,* 91 U. S. 389, 398). Both the District Court (R. 83) and the Circuit Court of Appeals (R. 91) held that the United States was dealing in private causes of action and in no sense acting in its sovereign capacity.

In support of its contention that the District Court had jurisdiction of the instant suit notwithstanding the prior pendency of the state court proceedings, the petitioner cites several district court decisions, none of which, it is submitted, have any application to the situation in the instant case. In the case of *U. S.* v. *McIntosh* (57 Fed. (2d) 573), relied upon by the petitioner, it appears that the United States was acting in its sovereign capacity as the owner and operator of a marine base which it had purchased pursuant to an Act of Congress, and that the State of Virginia, in which the premises were located, had relinquished to the United States all jurisdiction over the premises in question. Likewise, in the case of *United States* v. *Inaba* (291 Fed. 416), relied upon by the peti-

tioner, the United States was also acting in a sovereign capacity as trustee for its Indian wards. In cases involving lands allotted to the Indians, the jurisdiction of the federal courts has always been paramount. In *United States* v. *Babcock* (6 Fed. (2d) 160), the district court, in granting an injunction to the United States to prevent the opening of a ditch across the Lincoln Highway was fortified by a showing that the highway was an important artery in interstate commerce and a mail route, and furthermore it was admitted that the State of Indiana had no power to prevent this injury, so that in no sense was the court interfering with the power of a state or its courts. The case of *United States* v. *Lee* (106 U. S. 196), relied upon by the petitioner, is not concerned in any respect with questions of conflict of jurisdiction between state and federal courts.

## IV

**The complaint fails in any aspect to state a cause of action in equity.**

The complaint alleges:

(a) That by decrees of the Russian State (specified in the bill of particulars as the Soviet government), the Moscow Company was dissolved and the Company's title to its property and the title and interest of all of its stockholders in its property were confiscated and appropriated by the Russian State (Soviet government) (par. 4, R. 3). By such decrees (bill of particulars of Oct. 1, 1934, R. 22), all private insurance companies became subject to "liquidation" (R. 29), such decrees stating that "all property and assets of which, disclosed at the time of their liquidation, become the property of the Russian Socialist Fed-

erated Soviet Republic" (R. 29); their bank accounts were "transferred to the income of the Treasury" and they were "given the right to repudiate agreements concluded by a former owner of an enterprise before its nationalization" (R. 31). The debts and shares of such companies, "whose enterprises have been nationalized or sequestrated", were annulled (R. 30).

(b) That on or about November 16, 1933, the Russian State (Soviet government) assigned to the petitioner United States all of its right to the Moscow Company's property, and also assigned to the petitioner all the right, title and interest of all Russian nationals in such property, and that the petitioner has been and now is the "sole and exclusive owner entitled to the immediate possession" of the Moscow Company's property (par. 6, R. 4).

(c) That on April 18, 1933, the N. Y. Superintendent of Insurance transferred and delivered the Moscow Company's property now in question, pursuant to an order of the N. Y. Supreme Court (now set forth in the second bill of particulars) to the defendant Trust Company "as agent or depositary of the said Moscow Fire Insurance Company, said fund not to be withdrawn except upon the order of a court of competent jurisdiction" (par. 5, R. 3).

(d) A demand and refusal (par. 7, R. 4).

(e) Allegations which simply enumerate the foregoing allegations, with the conclusion that the respondent Trust Company holds the said property as "fiduciary and trustee for the complainant" (par. 8, R. 4), and that the petitioner has no adequate remedy at law (par. 9, R. 4).

The allegation that the respondent holds the property as "fiduciary and trustee" for the petitioner (R. 4) is a mere conclusion, amounting, in connection with the other

allegations, at most, to an allegation of bailment (*Young v. Mercantile Trust Co.*, 140 Fed. 61, affirmed on appeal, 145 Fed. 39). The complaint, therefore, presents a situation where the petitioner, as alleged assignee, asserts an alleged legal title to property in the possession of respondent. But respondent is not a trustee, the state court order of August 11, 1931 (petitioner's bill of particulars, R. 23) showing that the respondent is a bailee (R. 24, 25).

Furthermore, the complaint is silent as to any allegations of fact showing that petitioner has no adequate remedy at law.

## Conclusion

The decree of the court below, affirming the decree of the District Court dismissing the bill of complaint, should be affirmed. In the event that this Court should be of the opinion that the federal court has no jurisdiction of the controversy, this Court should, it is respectfully submitted, nevertheless indicate its views with reference to the merits of the dismissal of the bill of complaint by the District Court, to the end that multiplicity of suits may be avoided and the long litigation with reference to the disposition of Russian corporate funds in the United States, may be terminated.

Respectfully submitted,

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